



P.O. Box 3283 Fremont, CA 94539
tel (510) 490-1690
www.earthlawcenter.org

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Paul Massera
California Water Plan Update 2013
California Department of Water Resources
P.O. Box 942836, Sacramento, CA 94236-0001

VIA ELECTRONIC MAIL: cwpcom@water.ca.gov

Re: Comments on California Water Plan Update 2013, Volume 1: The Strategic Plan

Dear Mr. Massera:

Earth Law Center (ELC), a California 501(c)(3) environmental organization, welcomes the opportunity to submit these comments on California Water Plan Update 2013, Volume 1 (Plan). The state's growing water concerns clearly demand swift, bold action. In that regard, we make two specific requests in these comments, both related to Guiding Principle 8 in Chapter 8 of Volume 1 of the Plan. Chapter 8 attempts to address the need for sound water management in part through a series of Guiding Principles that support the Plan's proposed "Roadmap for Action." Guiding Principle 8 reads:

Apply California's water rights laws, including the longstanding constitutional principles of reasonable use and public trust, as the foundation for public policy-making, planning, and management decisions on California water resources.... Effectively applying existing water rights laws and the twin principles of reasonable use and public trust will provide water for future generations while protecting ecosystem values.

(Plan, p. 8-4.) Despite correctly identifying the need to effectively apply existing water rights laws, as well as use the significantly-underutilized waste and unreasonable use and public trust doctrines, the Plan makes essentially no mention of these critical tools in the following set of specific Objectives and Related Actions. Accordingly, we first urge DWR to include specific Objectives and Related Actions in the Plan that will outline, and commit the state to implementing expeditiously, the steps that will be taken to "apply[] existing water rights laws and the twin principles of reasonable use¹ and public trust" to ensure water for current and future generations.

Second, the Plan should commit the state to the development of an instream water rights law and implementation program, to ensure that waterways enjoy legal rights to the water they need at a level *legally* "co-equal" to human uses. Currently, our water laws create an inherent imbalance

¹ For example, the Delta Watermaster began a discussion in early 2011 around the potential for a more streamlined waste and unreasonable use program that would facilitate increased agricultural water use efficiency. (Craig Wilson, Delta Watermaster, "The Reasonable Use Doctrine and Agricultural Water Use Efficiency" (Jan. 2011), available at: http://www.swrcb.ca.gov/board_info/agendas/2011/jan/011911_12_reasonableusedoctrine_v010611.pdf.)

This initiative, however, was shut down quickly, and little public action has occurred since then to create a streamlined effort to identify and correct waste and unreasonable water use statewide.

between over-allocation of water rights for human use of water, and no water rights in law for the environment's use of water. We must recognize the inherent rights of waterways to flow through the development of an effective instream water rights program, which will allow waterways to legally be "at the table" when their flow needs are being assessed.

If water rights are to be the legal system by which water is allocated, then the law must reflect the science and ethics of our integration with our environment: legal water rights for waterways must be developed, allocated, and enforced to support water needs for healthy aquatic ecosystems and a healthy California. This necessarily must include all water sources, including aquifers, given their connections in the state water system. Our legal system currently addresses ecosystem water needs only indirectly, through such methods as conditions in permits, mandates to prevent "waste and unreasonable use" (when implemented), Water Code Section 1707 water transfers, the public trust doctrine, and application of the Endangered Species Act. None of these otherwise important tools are actual water *rights*, however, at a level equivalent to currently-allocated water rights for human uses. The result to date has been that ecosystem water needs are consistently relegated to a tangential role in state water planning, until the ecosystems and/or their non-human inhabitants are at the brink of collapse.

In addition to identifying in law the rights of waterways to the flows that they need, the state should establish processes for pairing these ecosystem water rights with identified water sources. Strategies to "harvest" flows as needed for ecosystem water rights include but are not limited to the following:

- "Waste and unreasonable use" determinations made consistent with Water Code Section 275 and California Constitution Article X, Sec. 2, as discussed above;
- Efforts to help convince water rights holders to give up rights voluntarily via potential charitable giving process (which would require a clear, long-term accounting system);
- Review of unexercised rights and reapplication to ecosystem needs as appropriate;
- Formal water adjudications;
- Work with the federal government to review the allocation of federal water rights, and adjustment as needed to reflect the rights of waterways to flow;
- Development of a process to assign rights associated with "new" water from sources such as ecosystem-focused conservation and water recycling; and
- Increases in fees on diversions to encourage voluntary release of unneeded rights.

Given the significant over-allocation of water rights in the state on paper, and the unknown amount of water diverted under riparian and pre-1914 rights, this task may be complex and take some time. It is not, however, insurmountable in light of the numerous existing legal tools that the state could use if it chooses to plan wisely, rather than continue to rely on the courts as the effective arbiters of water governance in the state.

As water rights are freed up, they should be reassigned to waterways in a planned effort that considers the relative needs of waterways and fish populations. This will necessarily be an ongoing, evolutionary process in light of the fact that both uses and the waterways themselves will change over time (due to climate change, for example), as noted in the Plan's discussion of adaptive management.

Other key elements to address in developing a rights-based system for protecting the health of waterways and fish include enforcement and accounting. With respect to enforcement, ecosystem water rights, while they would be held by the waterway, must be managed by human agents. Independent legal guardians or trusts can be established for this task, and given a clear fiduciary responsibility to protect and enforce the identified water rights fully. While these entities should be accountable to the public, they should not be a government agency, as they must have full and primary responsibility for protecting the waterways to which they are assigned. Guardians/trusts necessarily should be appointed and be required to coordinate consistent with a statewide system focus, due to impacts of connected waterways and water systems.

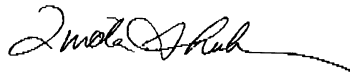
With respect to accounting, the state would need to ensure that flows put back into a waterway are being maintained in the waterway and not simply removed downstream. This is not a need limited to a “water rights for rivers” approach, but is one that is also applicable to the Section 1707 transfer process and other, existing approaches to restore waterway health. A clear system for tracking and maintaining assigned waterway flows in the medium- and long-term should be established to ensure success and provide accountability and transparency for the public.

Necessarily, the state should also develop a process for funding program costs, including guardian/trust costs, accounting and oversight, research and monitoring, and other program elements. A reliable source of funding is essential; oversight funding cannot simply be delegated to intermittent grants and allocations. Fees on water diversions, for example, should at a minimum be tapped as a regular funding stream, with less-regular sources (such as federal or other grants) identified for short-term/pilot initiatives.

Accordingly, we urge DWR to include in Chapter 8 specific Objectives and Related Actions in the Plan that will commit the state to the development and implementation of the legal and programmatic structures needed to recognize the inherent rights of waterways to flow, and for waterway-dependent fish and wildlife to thrive.

Thank you for your attention to these comments.

Best regards,

A handwritten signature in black ink, appearing to read "Linda Sheehan", with a stylized flourish extending to the right.

Linda Sheehan
Executive Director